



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2022-0121; FRL-9823-02-R3]

Air Plan Approval; Pennsylvania; 2015 Ozone National Ambient Air Quality Standards

Nonattainment New Source Review Certification SIP

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by the Commonwealth of Pennsylvania. The revision will fulfill Pennsylvania's nonattainment new source review (NNSR) SIP element requirement for the 2015 8-hour ozone national ambient air quality standard (NAAQS). EPA is approving these revisions to the Pennsylvania SIP in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2022-0121. All documents in the docket are listed on the www.regulations.gov website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through www.regulations.gov, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Justin Leary, Permits Branch (3AD10), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, Four Penn Center 1600 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103, Philadelphia, Pennsylvania

19103. The telephone number is (215) 814-2189. Mr. Leary can also be reached via electronic mail at Leary.Justin@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On May 31, 2022 (87 FR 32379), EPA published a notice of proposed rulemaking (NPRM) for the Commonwealth of Pennsylvania. In the NPRM, EPA proposed approval of Pennsylvania's existing Federally-approved NNSR regulations for the 2015 8-hour ozone NAAQS. The formal SIP revision was submitted by Pennsylvania Department of Environmental Protection (PADEP) on behalf of the Commonwealth of Pennsylvania (Commonwealth or Pennsylvania) on January 8, 2021.

Pennsylvania is certifying that the Commonwealth's federally approved nonattainment new source review regulation in 25 Pennsylvania Code of Regulations (Pa. Code) Chapter 127 applies statewide and covers the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE nonattainment area for the 2015 ozone NAAQS. Pennsylvania asserts that its nonattainment new source review program is at least as stringent as the requirements at 40 Code of Federal Regulations (CFR) 51.165, as amended by the final rule titled "Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements" (SRR) for ozone and its precursors. See 83 FR 62998 (December 6, 2018).

II. Summary of SIP Revision and EPA Analysis

This rulemaking action is specific to Pennsylvania's NNSR requirements. NNSR is a preconstruction review permit program that applies to new major stationary sources or major modifications at existing sources located in a nonattainment area. The specific NNSR requirements for the 2015 8-hour ozone NAAQS are located in 40 CFR 51.160–165.

The minimum SIP requirements for NNSR permitting programs for the 2015 8-hour ozone NAAQS are located in 40 CFR 51.165. See 40 CFR 51.1314. Under the 2015 8-hour ozone NAAQS NNSR SIP requirements, the SIP for each ozone nonattainment area must contain

NNSR provisions that: 1) set major source thresholds for oxides of nitrogen (NO_x) and volatile organic compounds (VOCs) pursuant to 40 CFR 51.165(a)(1)(iv)(A)(1)(i)–(iv); 2) classify physical changes as a major source if the change would constitute a major source by itself pursuant to 40 CFR 51.165(a)(1)(iv)(A)(3); 3) consider any significant net emissions increase of NO_x as a significant net emissions increase for ozone pursuant to 40 CFR 51.165(a)(1)(v)(E); 4) consider certain increases of VOC emissions in extreme ozone nonattainment areas as a significant net emissions increase and a major modification for ozone pursuant to 40 CFR 51.165(a)(1)(v)(F); 5) set significant emissions rates for VOCs and NO_x as ozone precursors pursuant to 40 CFR 51.165(a)(1)(x)(A)–(C) and (E); 6) contain provisions for emissions reductions credits pursuant to 40 CFR 51.165(a)(3)(ii)(C)(1)–(2); 7) provide that the requirements applicable to VOC also apply to NO_x pursuant to 40 CFR 51.165(a)(8); and 8) set offset ratios for VOC and NO_x pursuant to 40 CFR 51.165(a)(9)(i)–(iii) (renumbered as (a)(9)(ii)–(iv) under the SIP Requirements Rule for the 2008 8-hour ozone NAAQS).

Pennsylvania's SIP approved NNSR program, established in the Pa. Code Rule 25 Pa. Code Chapter 127— Construction, Modification, Reactivation, and Operation of Sources, applies to the construction and modification of major stationary sources in nonattainment areas. In the October 30, 2017, SIP revision, Pennsylvania certifies that the version of 25 Pa. Code Chapter 127 in the SIP is at least as stringent as the Federal NNSR requirements for the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE nonattainment area. EPA last approved revisions to Pennsylvania's major NNSR SIP on February 22, 2019. In that action, EPA approved Pennsylvania's NNSR program under the 2008 8-hour ozone NAAQS and made PADEP's NNSR program consistent with Federal requirements. See 84 FR 5598 (February 22, 2019). The version of 25 Pa. Code Chapter 127 that is contained in the current SIP and covers the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE nonattainment area and is adequate to meet all applicable NNSR requirements for the 2015 8-hour ozone NAAQS found in 40 CFR 51.165, and the SRR.

Other specific requirements of the SRR and the rationale for EPA's proposed action are explained in the NPRM and will not be restated here.

III. EPA's Response to Comments Received

EPA received one comment on our proposed approval of Pennsylvania's 2015 Ozone NNSR Certification SIP. A summary of the comment and EPA's response is provided herein. The comment received is included in the docket for this action.

Comment: The commenter asserts that EPA failed to address the fact that Pennsylvania submitted a letter withdrawing specific portions of the January 8, 2021, SIP revision submittal related to inter-precursor trading (IPT) provisions. In doing so, EPA has proposed an approval without excluding the IPT provision that unlawfully allows IPT to satisfy the Clean Air Act's offset requirements for ozone precursors. The commentor asserts that EPA must state explicitly in its final action that it is not approving the IPT provisions of the January 8, 2021, SIP and that it is approving, as a SIP commitment, Pennsylvania's promise not to issue any NNSR permits or plan approvals that rely on IPT. Finally, the commentor asserts that the approval should be conditional on Pennsylvania following through on their commitment to remove ozone related IPT provision from the commonwealth's regulations.

Response: On January 29, 2021, the United States Court of Appeals for the D.C. Circuit concluded that ozone IPT trading is not permissible under the CAA and vacated ozone IPT trading, i.e., the IPT trading provision in the Federal NNSR regulations. *Sierra Club v. EPA*, 985 F.3d 1055 (D.C. Cir. 2021). EPA removed the language allowing IPT trading for ozone from its NNSR regulations. 86 FR 37918 (July 19, 2021). In response to that the July 19, 2021, rule, on August 23, 2021, PADEP sent a letter to EPA that withdrew from EPA's review the specific portions of PADEP's January 8, 2021, SIP revision submittal that related to inter-precursor trading (IPT).

EPA agrees with comment to the extent that EPA should have affirmatively addressed the August 23, 2021, letter and the fact that PADEP had withdrawn from EPA review the (IPT)

provisions submitted with the January 8, 2021, SIP revision. Pennsylvania clearly intends to not apply the IPT provisions to ozone as made evident by the August 23, 2021, letter to the EPA. Furthermore, we acknowledged in this action that the provisions for IPT for ozone had been withdrawn from our consideration, as reflected by our inclusion of the August 23, 2021, letter in the docket for the action. Therefore, EPA's proposed approval of Pennsylvania's 2015 ozone NNSR certification SIP did not at any time include a proposed approval of any provisions relating to IPT for ozone, consistent with the D.C. Circuit's decision. EPA affirms that, in light of the D.C. Circuit's decision (and consistent with Pennsylvania's explicitly stated intent in the withdrawal letter), it would be inappropriate for Pennsylvania to issue NNSR permits which relied on IPT for ozone precursors. Pennsylvania's regulations for the issuance of plan approvals provide for public notice and comment, in accordance with CAA requirements. EPA has the ability to review and comment on any deficiency in a draft plan approval, including an inappropriate use of IPT for ozone.

However, EPA disagrees with the commentor's assertion that the approval must be conditional on Pennsylvania following through on its commitment to remove the IPT provisions in the commonwealth's regulations. This action only addresses the adequacy of Pennsylvania's SIP for purposes of implementing the 2015 ozone NAAQS. Because of the withdrawal reflected in the Commonwealth's August 23, 2021, letter, the IPT language in Pennsylvania's regulations is not before EPA for approval in this action. Since the Pennsylvania provisions included in this SIP submission are adequate for purposes of implementing the 2015 ozone standard, Pennsylvania's 2015 Ozone NNSR Certification SIP is approvable without the condition requested by the commenter.

IV. Final Action

EPA's review of this material indicates that Pennsylvania's submission fulfills the 40 CFR 51.1114 revision requirement, meets the requirements of CAA sections 110 and 172 and the minimum SIP requirements of 40 CFR 51.165. Therefore, we are finalizing our approval of

Pennsylvania's NNSR SIP for 2015 8-hour ozone NAAQS.

V. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). *C. Petitions for Judicial Review.* Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not

postpone the effectiveness of such rule or action.

This action pertaining to Pennsylvania’s 2015 Ozone NNSR Certification may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Adam Ortiz,
Regional Administrator,
Region III.

For the reasons set out in the preamble, 40 part 52 is amended as follows:

PART 52—APPROVAL PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart NN--Pennsylvania

2. In § 52.2020, the table in paragraph (e)(1) is amended by adding an entry for “2015 8-Hour Ozone National Ambient Air Quality Standard Nonattainment New Source Review Requirements” at the end of the table to read as follows:

§ 52.2020 Identification of plan.

* * * * *

(e)***

(1) ***

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* * * * *				
2015 8-Hour Ozone NAAQS Nonattainment New Source Review Requirements	Pennsylvania's portion of the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE area (includes Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties)	1/8/21 8/23/21	<u>[Insert date of publication in the Federal Register, Insert Federal Register citation]</u>	

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